NO. 91-543, 91-558, 91-563

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, AND THE COUNTY OF CORTLAND,
Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.,
Respondents,

THE STATE OF WASHINGTON, THE STATE OF NEVADA, and THE STATE OF SOUTH CAROLINA,
Intervenors - Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF IN SUPPORT OF REVERSAL

AMICUS BRIEF OF THE STATES OF OHIO, ARKANSAS, GUAM, ILLINOIS, INDIANA, KENTUCKY, MAINE, MASSACHUSETTS, NEBRASKA, NEW JERSEY, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, WEST VIRGINIA AND WISCONSIN

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STATEMENT OF INTEREST

Amici have a manifest interest in questions that lie at the core of state sovereignty interests. *Amici* believe the decision of the court of appeals below is a precedent that profoundly impacts the nature of federal - state relations. As explained below, the decision sanctions a statute known as the "Take Title Provision" that violates the Tenth Amendment and Guarantee Clause and shifts substantial liabilities from the Federal Government, and from an industry it has traditionally protected, onto States. *Amici* include States that have entered into compacts under the Low-Level Radioactive Waste Policy Amendments Act of 1985, as well as unaligned States. *Amici* accordingly submit this brief to assist the Court in the resolution of the States' rights issues in this case.

SUMMARY OF ARGUMENT

The Take Title Provision[1] involved in this case should be held unconstitutional because it tramples on state sovereignty by putting state legislative and executive branches squarely under the thumb of Congress. The Take Title Provision compels a State, on and after January 1, 1996, to take title to, possession of and liability for low-level radioactive waste generated within its borders upon request by the generator, unless the State has developed or secured access to a disposal facility to serve generators. This statute will force States to take waste not only from commercial generators, but also from some of the Federal Government's generators.

The Take Title Provision is more "intrusive on state sovereignty" - according to the Congressional Research Service - than any other statute reviewed by a court. The compulsory nature of the provision compels state legislatures and executives to make and implement decisions at the beckoning of the Federal Government. According to its

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[1] Section 5(d)(2)(C) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act"), 42 U.S.C. 2021e(d)(2)(C).

author, it "is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S18113 (remarks of Sen. Johnston).

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) (*FERC*) framed the question, left open by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *FERC*, 456 U.S., at 759. *FERC* essentially answered the question as follows: commandeering state regulatory machinery threatens the States' "separate and independent existence," *id.*, at 765, removes their ability to make fundamental decisions which is the "quintessential attribute of sovereignty," *id.*, at 761, and impairs the ability of the States "to function effectively in a federal system." *Id.*, at 765-766. Thus, the Tenth Amendment protects States from federal commandeering of state *regulatory* machinery.

The question presented by this case, however, involves an even more intrusive statute: to what extent does the Tenth Amendment shield the States from the compelled creation and commandeering of state *proprietary* activities in the marketplace to advance federal interests? *FERC*, *Garcia* and *South Carolina* essentially answered the question as follows: "the people - acting ... through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires." *Garcia*, 469 U.S., at 546. Thus, the Tenth Amendment protects the States from the forced creation and commandeering of state proprietary activities in the marketplace to advance federal interests.

The decision below also clashes with the teachings of *Gregory v. Ashcroft*, 11 S.Ct. 2395 (1991), that the Tenth Amendment reserves to the States, and the Guarantee Clause guarantees them, "authority that lies at the heart of representative government." This includes the power to decide whether and when to pass and to execute laws to

establish a State as a provider of waste management services The Guarantee Clause guarantees to the States a "Republican Form of Government", U.S. Const. art. IV, Section 4, which is one in which "the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

The Take Title Provision has the effect of depriving citizens of control over their state government. It has the effect of compelling a State to rearrange its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. The provision displaces citizen control over how States disburse state-generated tax funds, and puts state treasuries at risk. States are accountable not to their citizens, but to Congress.

The decision below sets a precedent for congressional acts compelling a State to provide not only waste disposal services, but also power generation, hospitals or other services which Congress may feel are inadequately served by the free market or are needed by the Federal Government. The decision also frustrates state innovation such as encouraging the development of private nuclear waste disposal utilities.

The provision threatens serious disruption to the stability of compacts, inasmuch as its legislative history suggests congressional consent to compacts is conditioned on States strictly complying with the provision. While States are generally progressing with the development of disposal facilities, it is anticipated that not all States will be able to develop or to obtain access to a disposal facility by 1996. A self-executing termination of consent would be highly disruptive to compacts under the 1985 Act.

In sum, the Take Title Provision tramples on state sovereignty. *Amici* respectfully request that the Court sever

the Take Title Provision and construe the remainder of the 1985 Act to avoid constitutional problems.

STATEMENT OF THE CASE

Congress passed the Atomic Energy Act of 1954 to promote the commercial use of radioactive materials.[2] The resulting use of radioactive materials in power generation, medical diagnosis and treatment, industry and research produced a growing quantity of commercial radioactive waste.

In the late 1950's the Atomic Energy Commission (AEC) created the term "low-level radioactive waste" to refer to a broad and imprecise category of radioactive waste that includes equipment, sludges, filters, paper and clothing contaminated with radioactive substances.[3] Some low-level radioactive waste remains radioactive for over 300 years and requires extensive shielding from humans.[4]

By 1958 the AEC had licensed six companies to dispose of low-level radioactive waste at sea. Mazuzan & Walker, *supra*, at 354. In response to public outcry, the AEC in the early 1960's ceased licensing sea disposal and began licensing land burial sites. See *id.*, at 364-368. By 1979 two companies were operating three commercial land disposal

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[2] See Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. 2011, et seq.

[3] The Atomic Energy Act of 1954 assigned to the Atomic Energy Commission the responsibility to promote and to regulate commercial use of radioactive materials. See 42 U.S.C. 2021b(9); George T. Mazuzan & J. Samuel Walker, *Controlling the Atom* 346 (1984).

[4] U.S. Congress, Office of Technology Assessment, *Partnerships Under Pressure: Managing Commercial Low-Level Radioactive Waste*, 83-85 (1989). "High-level radioactive waste," on the other hand, remains radioactive for hundreds of thousands of years and requires burial in deep underground repositories. See *id.*, at 82; 42 U.S.C. 10101(12). In 1982 Congress assigned to the Department of Energy the responsibility to develop a repository for high-level radioactive waste. 42 U.S.C. 10101, et seq.

facilities, one each in Nevada, South Carolina and Washington.

In 1980 the National Governors' Association's Task Force on Low-Level Radioactive Waste, acting in response to a perceived national shortage of disposal facilities, recommended that "[e]ach state accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities."[5] The NGA Task Force Report recommended the formation of interstate compacts to develop regional facilities. Ct. App. J.A. 241. The NGA Task Force Report preferred state to federal oversight of the development of disposal facilities. *Id.*, at 236.

In 1980 Congress passed the Low-Level Radioactive Waste Policy Act ("1980 Act") which adopted the NGA Task Force Report recommendation of encouraging States to have a primary role in the development of disposal facilities for commercial and state waste. P.L. 96-573, 94 Stat. 3347. However, Congress in the 1980 Act departed from the NGA Task Force Report by also assigning to States responsibility for some of the Federal Government's waste.

The 1980 Act declared that "[i]t is the policy of the Federal Government that . . . each State is responsible for providing for the availability of capacity . . . for the disposal of low-level radioactive waste generated within its borders," including some waste generated by the Federal Government. P.L. 96-573, 94 Stat. 3348. The 1980 Act encouraged the development of regional disposal facilities under interstate

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[5] National Governors' Association, *Low-Level Waste: A Program for Action, Final Report of the National Governors' Association Task Force on Low-Level Radioactive Waste Disposal* 6 (1980) ("NGA Task Force Report"). The States of South Carolina, Nevada and Washington had threatened in 1980 to close the existing low-level radioactive waste disposal facilities located within their borders due to those States' "unwillingness to continue to shoulder the entire national burden for low-level waste." *Id.*, at 2. See Court of Appeals Joint Appendix ("Ct. App. J.A.") at 232, 237, 241.

compacts by allowing such compacts to exclude out-of-compact waste after January 1, 1986, provided the compact had received congressional consent. Congress expected - optimistically in hindsight - that it only would take five years to form compacts and develop disposal facilities.

In response to the 1980 Act, 39 States submitted to Congress seven compacts for congressional consent. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 3002, 3003. However, no new disposal facilities were projected to be operational until the early 1990s. *Id.* The States of Nevada, South Carolina and Washington had each joined compacts that had been submitted to Congress. Congressional consent to their compacts would have allowed their compacts as of January 1, 1986 to exclude out-of-compact waste from the existing disposal facilities located within these States' borders. Generators located in a State not a member of these compacts may have had to store their wastes on site for at least eight years.

In 1984 Representative Udall distributed to the States draft amendments to the 1980 Act that attempted to give more assurance that States would expeditiously develop disposal facilities. Extending access to the existing facilities until the early 1990's also was a concern. A working group under the National Governors' Association developed an "unofficial counter-proposal" that served as a basis for the the eventual amendments. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 1 at 14, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 2976.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act") imposes a schedule for the development of disposal facilities. Generators within States not meeting the schedule face denial of access to the three (3) existing facilities and or imposition of surcharges on their disposal fees. 42 U.S.C. 2021e(e)(1) and (2). The 1985 Act also prevents the States of South Carolina, Nevada and Washington from interfering with out-of-state access to the private facilities in their States until January 1, 1993, when the 1985 Act allows

their compacts to close their compact borders. 42 U.S.C. 2021e(a)-(c).

However, Congress added the Take Title Provision to the 1985 Act in the final hours of the legislative session without the same involvement of the National Governors' Association. The Take Title Provision provides as follows:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. 2021e(d)(2)(C).[6]

The author of the Take Title Provision described it as "a very far reaching, difficult, and punitive provision." 131 Cong. Rec. S18113 (remarks of Sen. Johnston). Senator McClure, chair of a committee having jurisdiction over the legislation, doubted its constitutionality. *Id.*, at S18114, S18118. Representative Markey concluded the provision "may not pass a constitutional challenge." *Id.*, at H13077. A Congressional Research Service analysis requested by

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[6] This *amicus* brief takes no position on whether the Take Title Provision applies to South Carolina, Washington and Nevada, all of which have intervened in this case in support of the United States, or whether that provision applies to any State in a compact with the intervening States. Nothing in this *amicus* brief is intended to affect a State in a compact with the intervening States regarding applicability of the Take Title Provision.

Representative Markey concluded that the provision is unprecedented and raises "constitutional issues" under the Tenth Amendment. *Id.* The analysis found that "[t]here does not appear to be pertinent judicial precedent that has upheld in the face of the 10th Amendment objections a federal mandate as intrusive on state sovereignty as the [federal compulsion] at issue here." U.S. Congress, Congressional Research Service, *Constitutional Issues Raised By the Imposition of Liabilities on the States Under A Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980*, Memo to House Committee on Energy and Commerce, December 16, 1985, page CRS-5.[7]

Congress has consented to nine interstate compacts in furtherance of the objectives of the 1985 Act. While States are generally progressing with development of disposal facilities, it is anticipated that not all States will be able to develop or obtain access to a disposal facility by 1996.

ARGUMENT

One of the greatest challenges facing the Framers of the Constitution was the allocation of power between the Federal Government and the States. The historical analysis in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 791-796 (1982)(dissenting opinion), shows that the Framers intended that the sovereignty of the States be an important factor in the balance of power, thereby avoiding the creation

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[7] The 1985 Act has a second provision that presents serious constitutional concerns. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators.

To the extent, if any, that this provision may be construed as establishing a cause of action for failure of a State, including any State not subject to the Take Title Provision, to comply with the provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

of a lone "super-sovereign" with complete control over the affairs of the citizenry:

> "The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt. This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign." *Id.*, at 795-796.

In the case at bar, the court of appeals below failed to protect state sovereignty due to a misreading of the Tenth Amendment and Guarantee Clause decisions of the Court. The Court should hold the Take Title Provision unconstitutional, sever it from the 1985 Act and construe the remainder of the 1985 Act to avoid constitutional concerns.

I. THE TAKE TITLE PROVISION VIOLATES THE TENTH AMENDMENT BY COMPELLING THE CREATION AND COMMANDEERING OF STATE PROPRIETARY MACHINERY IN THE MARKETPLACE FOR FEDERAL INTERESTS.

The Court's three most recent major Tenth Amendment cases, discussed below, indicate that to date the Court has left open the question: to what extent does the Tenth Amendment shield the States from federal commandeering of state regulatory machinery? These three cases effectively answer the question as follows: the Tenth Amendment protects the States from such intrusions on state sovereignty. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. 10.

In *Federal Energy Regulatory Commission v. Mississippi*,

456 U.S. 742 (1982)(*FERC*), the Court considered the question of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *Id.*, at 759. The statute at issue directed state utility regulatory commissions to "consider" the adoption and implementation of specific "rate design" and regulatory standards.[8] The Court first distinguished prior Tenth Amendment cases as involving "generally applicable federal regulations," and noted that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . . ." *Id.*, at 759, 761-762. The Court saw such a command as implicating the essence of state sovereignty:

> "We acknowledge that '*the authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty.* Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. . . . *It would follow that the ability of a state legislative (or, as here, administrative) body - which makes decisions and sets policy for the State as a whole - to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.*" *Id.*, at 761 (citations omitted) (emphasis added).

FERC upheld PURPA because it merely required the consideration, not the adoption, of regulatory standards. Nor did PURPA "set a mandatory agenda to be considered in all events." *Id.*, at 769. " '[T]here can be no suggestion that [PURPA] commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program.' " *Id.*, at 764-765, quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 288 (1981).

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[8] Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (PURPA). *FERC*, 456 U.S., at 746.

Like the statutes in pre-*FERC* cases, the statute in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the next major case, involved a "generally applicable federal regulation." The regulation required SAMTA to comply with overtime obligations under the Fair Labor Standards Amendments (FLSA). In contrast to the Take Title Provision, the regulation in *Garcia* did *not* compel Texas to create SAMTA, or allow the Federal Government to commandeer it. To the contrary, the Court, in reviewing the nation's history of state proprietary activity, concluded States must be free to choose whether to engage in such activities:

> "The essence of our federal system is that within the realm of authority left open to them under the Constitution, *the States must be equally free to engage in any activity that their citizens choose for the common weal*, no matter how unorthodox or unnecessary anyone else - including the judiciary - deems state involvement to be. . . . 'The genius of our government provides that, within the sphere of constitutional action, *the people - acting not through the courts but through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires.' Helvering v. Gerhart*, 304 U.S. [405, 427 (1938) (concurring opinion).]" *Id.*, at 546.

Under the then existing "traditional government function" test, Tenth Amendment immunity from "generally applicable federal regulations" was dependent, *inter alia*, on whether States had traditionally engaged in the type of proprietary activity involved in the case. See, *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The Court, however, did not believe a State should suffer the loss of immunity by engaging in innovative proprietary activity. *Garcia*, 469 U.S., at 546. To the contrary, it found that the freedom to choose whether to engage in proprietary activity allows States "to serve as laboratories for social and economic experiment." *Id.* The Court, for this and other reasons, thus rejected the

traditional government function test "as unsound in principle and unworkable in practice." *Id.*

The Court neither doubted the existence of "limits on the Federal Government's power to interfere with state functions," nor saw the case at hand as requiring the Court "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States." *Id.*, at 547, 566. Insofar as concerned the case at hand, a case involving a generally applicable federal regulation, the Court turned to "the structure of the Federal Government itself." *Id.*, at 554, 550. It set forth a two-part test for Tenth Amendment immunity: the immunity "must find its justification" in the "structure of the Federal Government," and it "must be tailored to compensate for possible failings in the national political process." *Id.*, at 554, 550. As the Court saw the structure of the Federal Government and the national political process as protecting States in the case, the Court upheld the application of FLSA to SAMTA.

The third major Tenth Amendment case, *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), like *Garcia* and pre-*FERC* cases, also involved a "generally applicable federal regulation," in this case a tax statute that effectively prohibited the issuance of bearer bonds.[9] Since the statute did not attempt to compel the State to issue bonds of any type, the Court distinguished the case from *FERC*, "which [had] left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." *Id.*, at 1361. As there only was a generally applicable federal regulation and no "commandeering" of state legislative or regulatory machinery, the Court upheld the statute under *Garcia* due to the absence of any allegations of defects in the political process.

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[9] Tax Equity and Fiscal Responsiblity Act of 1982 (TEFRA), Pub.L. 97-248, 96 Stat. 596, 26 U.S.C. 103(j)(1). TEFRA was intended to reduce tax fraud by encouraging the issuance of more easily traceable registered bonds.

FERC framed the question, which *Garcia* and *South Carolina* left open, of to what extent the Tenth Amendment "shields" the States from "Federal Government attempts to use state regulatory machinery to advance federal goals." *FERC*, 456 U.S., at 759. *FERC* essentially answered the question as follows: commandeering state regulatory machinery threatens the States' "separate and independent existence," *id.*, at 765, removes their ability to make fundamental decisions which is the "quintessential attribute of sovereignty," *id.*, at 761, and impairs the ability of the States "to function effectively in a federal system." *Id.*, at 765-766. Thus, the Tenth Amendment protects States from federal commandeering of state *regulatory* machinery.

The question presented by this case, however, involves an even more intrusive statute: to what extent does the Tenth Amendment shield the States from the compelled creation and commandeering of state *proprietary* activities in the marketplace to advance federal interests? The Take Title Provision is far more intrusive than the statute in *FERC*. Here, a State must pass and execute laws to establish itself as a market proprietor of waste services. It can not cease the proprietary activity. The statute puts at risk the state treasury. State elected officials become accountable to the Federal Government, not to their citizens. *FERC*, *Garcia* and *South Carolina* essentially answered the question as follows: "the people - acting . . . through their elected [state] legislative representatives - have the power to determine as conditions demand, what services and functions the public welfare requires." *Garcia*, 469 U.S., at 546. The Tenth Amendment protects the States from the forced creation and commandeering of state proprietary activities in the marketplace to advance federal interests.[10]

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[10] The Eleventh Amendment is a third expression of federalism and republicanism which recognizes the sovereignty of the States as an important force in the balance of power between the States and the Federal Government. It is a restraint on judicial power, intended to support the sovereignty of the States and to limit state exposure to liability in the federal court system. The Eleventh Amendment functions as a protection for the benefit of the States as sovereigns. To the extent the Take Title Provision purports to expose the States to claims as

Amici join Petitioner State of New York in urging the Court to find the Take Title Provision in violation of the Tenth Amendment. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177-179 (1803).[11] Otherwise, Congress could compel a State to provide not only waste disposal services, but also power plants, airports, hospitals and whatever other services or goods Congress may feel are lacking in the marketplace or needed by the Federal Government.

II. THE TAKE TITLE PROVISION VIOLATES THE GUARANTEE CLAUSE AND THE TENTH AMENDMENT BY COMPELLING A STATE TO PASS AND TO EXECUTE LAWS ENGAGING THE STATE IN PROPRIETARY ACTIVITY.

The Guarantee Clause of the U.S. Constitution ensures that citizens have proper control over their state

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[10] *(Footnote 10 cont.)*

an indemnitor of other generators within its borders, the Take Title Provision implicates the State's sovereignty which the Eleventh Amendment is intended to support.

[11] The two-part "political process" test of *Garcia* does not apply here because the Take Title Provision is not a "generally applicable federal regulation." See above discussion. The Take Title Provision nevertheless is unconstitutional under that test as well. First, the political process can not ensure protection of States' rights when federal and state interests conflict such as here. Congress had an interest in compelling States to handle the Federal Government's waste problem. Moreover, Congress had an interest in shifting to States any risk of the federal program not accomplishing its objective of giving generators access to disposal facilities by January 1, 1996. Second, the structure of the Federal Government provides judicial checks and balances which are needed in this case because of the conflict between federal and state interests.

governments. That clause provides that "the United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, Section 4. "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

In *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991), the Court recently invoked the plain statement rule, a rule of statutory interpretation, to avoid a "potential constitutional problem" presented by a requested application of the Federal Age Discrimination in Employment Act of 1967 (ADEA) to preempt a mandatory retirement provision for judges in a state constitution. The Court reviewed its precedents and concluded that the Guarantee Clause is a shield against congressional intrusion on state authorities at the heart of representative government:

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. *It is an authority that lies at " 'the heart of representative government.' "* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantees to every State in this Union a Republican Form of Government."

Id. (citations omitted) (emphasis added). Thus, the Court narrowly construed the ADEA and upheld the state mandatory retirement provision.

The lower court's decision clashes with the teachings of *Ashcroft* that the Guarantee Clause is a shield against congressional infringement on the authority of a State to

make decisions that lie at "the heart of representative government." *Id.*[12] The heart of state representative government includes the power to set a legislative agenda and to decide whether and when to pass laws, particularly if the State is to decide whether or when to become a market participant. The decision below, however, renders the Guarantee Clause powerless to prevent Congress from forcing States to become agents of the federal government.

The compulsory nature of the Take Title Provision deprives citizens of control over state government. The provision has the effect of compelling a State to alter its legislative agenda and to pass laws to establish a means for the State to collect, to transport, to treat, to store and or to dispose of waste. It has the effect of compelling a State to use its executive powers to implement such laws, and its judicial powers to resolve disputes. It displaces citizen control over how States disburse state-generated tax funds. States are accountable not to their citizens, but to Congress.

The Tenth Amendment, however, reserves to the States, and the Guarantee Clause guarantees them, the the power to decide whether and when to pass and to execute laws to provide waste management services as a market participant. These decisions lie at "the heart of representative government." *Ashcroft, supra.* "Federal attempts to appropriate state governmental resources [to force implementation of federal policies] deny the states a republican form of government." Merritt, 88 Colum. L. Rev., at 61. The Take Title Provision violates the Guarantee Clause and the Tenth Amendment.

III. THE TAKE TITLE PROVISION'S VIOLATIONS OF THE TENTH AMENDMENT AND GUARANTEE CLAUSE ARE EGREGIOUS.

The Take Title Provision egregiously commandeers state

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[12] *Ashcroft* was decided after oral argument of this case in the court of appeals below.

sovereignty in violation of the Tenth Amendment and Guarantee Clause. First, there is no place for "punitive" regulation of sovereign States in our system of federalism. Yet, according to the author of the Take Title Provision, the provision "is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. S18113 (remarks of Sen. Johnston).

Second, Congress itself in the 1985 Act found it neither reasonable nor appropriate to impose a similar burden on the Federal Government in the analogous area of federal development of disposal facilities for a fourth class of low-level radioactive waste, see 42 U.S.C. 2021c(b)(1)(D) (greater-than-class C waste), or for high-level radioactive waste. 42 U.S.C. 10222(a)(1) and 10143 (Department of Energy takes generator's high-level radioactive waste only after DOE facility is available). To the contrary, a congressional study recognized the difficulties the Federal Government has encountered in nuclear waste management. U.S. Congress, Office of Technology Assessment, *Managing Commercial High-Level Radioactive Waste* 10 (1982) ("*The greatest single obstacle* that a successful waste management program must overcome *is the severe erosion of public confidence in the Federal Government* that past problems have created") (emphasis in original).

The third reason the provision egregiously commandeers state sovereignty is that it allows Congress to shift liabilities from the Federal Government, and from an industry it has traditionally protected, onto States. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978) (Atomic Energy Act "encouraged the private sector to become involved in the development of atomic energy for peaceful purposes"). The provision even could have the adverse effect of encouraging the Federal Government and industry to generate more waste.

If the provision were upheld, it could encourage Congress to require States to provide whatever services Congress found to be difficult or distasteful to handle:

> "If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform the federal programs for free." Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 929 (1989).

Thus, the Take Title Provision egregiously commandeers state sovereignty in violation of the Tenth Amendment and Guarantee Clause.

IV. THE COURT SHOULD SEVER THE TAKE TITLE PROVISION AND CONSTRUE THE REMAINDER OF THE 1985 ACT TO AVOID CONSTITUTIONAL CONCERNS.

The Take Title Provision *now* should be held unconstitutional in its entirety because its legislative history indicates an expressed intent to preclude States from challenging the constitutionality of the provision as a defense to an enforcement action after January 1, 1996. A failure of a compact State to comply with the Take Title Provision, for whatever reason, risks a self-executing termination of congressional consent to its compact. Congress' consent to compacts has been "subject to" the 1985 Act. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, P.L. 99-240, 99 Stat. 1859 (passed concurrent with 1985 Act). "[T]he failure to comply voluntarily with the requirement that title and possession be taken - one of the principal conditions of consent to any regional compact - means that the entire compact in which such State is a member will be null and void, invalid, and cannot be implemented." 131 Cong. Rec. S18252 (remarks of Sen. Simpson).

Termination of consent would be highly disruptive to the compact system under the 1985 Act. See *Tobin v. United States*, 306 F.2d 270, 272-273 (D.C. Cir. 1962), *cert. den.*, 371 U.S. 902 (1962) ("suspicion of even potential

impermanency would be damaging to the very concept of interstate compacts"). Congressional consent expressly allows compacts to exclude out-of-compact waste, which is a centerpiece of the 1985 Act. The Take Title Provision, if left to stand, risks serious disruption to the compact system under the 1985 Act. Thus, the Court now should hold the provision unconstitutional in its entirety.

It is the duty of a court to separate constitutional provisions from unconstitutional provisions, and to maintain the remainder of the act in so far as it is valid. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.*, at 685. The "relevant inquiry in evaluating severability is whether the [remainder of the] statute will function in a *manner* consistent with the intent of Congress." *Id.* (emphasis in original).

Here, the language and structure of the 1985 Act and its legislative history indicate a congressional intent of severance of the Take Title Provision from the remainder of the 1985 Act. The Take Title Provision is independent in its operation from the remainder of the 1985 Act. Severing the provision would not affect the remaining milestones encouraging States to develop or obtain access to disposal facilities. Thus, the remainder of the 1985 Act would function in the manner intended by Congress.

The legislative history of the 1985 Act indicates that Congress would have passed the 1985 Act without the Take Title Provision had it known the provision was unconstitutional. First, Senators and Representatives uniformly expressed the urgency to pass legislation by the end of 1985 in order to avert a second waste disposal crisis. Second, they also uniformly stressed passage of legislation embodying the "unofficial counter-proposal" of the National Governors' Association. The "unofficial counter-proposal," highly praised by Senators and Representatives, did not include the Take Title Provision. Third, the House passed the 1985 Act without the Take Title Provision. The 1985 Act

was based on NGA's "unofficial counter-proposal." Fourth, the Senate only raised the Take Title Provision in the rush of the final hour of the 1985 legislative session. Thus, the language and structure of the 1985 Act and its legislative history indicate a congressional intent to pass the 1985 Act without the Take Title Provision.[13]

It is an elementary rule that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 108 S.Ct. 1392, 1397 (1988). "[T]he Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

The 1985 Act has a second provision - the "General Assignment Provision" - that presents serious constitutional concerns. However, unlike the Take Title Provision, this provision is amenable to a reasonable construction to save it from unconstitutionality. Title 42 U.S.C. Section 2021c(a)(1) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States," for the disposal of three (3) classes of low-level radioactive waste generated within the State by private and some Federal Government generators. To the extent, if any, that the General Assignment provision may be construed as establishing a cause of action for failure of a State to comply with this provision, it also unconstitutionally infringes on state sovereignty in the manner described herein for the Take Title Provision.

The General Assignment Provision may be reasonably construed to be a policy statement or statement of intent for the 1985 Act. There is nothing in the legislative history

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[13] Although the 1985 Act did not include a severability provision, "Congress' silence is just that - silence - and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S., at 686. Also, notwithstanding the statements of some Senators on severability, there was broad consensus in the Senate that the remainder of the 1985 Act was critically needed to avert a crisis.

to indicate that the General Assignment Provision is anything but a congressional policy statement or statement of intent. Moreover, its predecessor provision in the 1980 Act expressly stated that it was the "policy" of the Federal Government that states had disposal responsibilities. Thus, the Court should reasonably construe the General Assignment Provision to save it from unconstitutionality.[14]

[14] If the Court does not construe the General Assignment Provision, however, it should declare the provision unconstitutional and sever it for the same reasons discussed for the Take Title Provision. The Court also should reasonably construe the milestone requirements at 42 U.S.C. 2021e(e)(1) merely as preconditions for avoiding surcharges and denial of access under 42 U.S.C. 2021e(e)(2), for the same reasons discussed above for the General Assignment Provision.

CONCLUSION

Amici respectfully request that the Court sever the Take Title Provision and construe the remainder of the 1985 Act to avoid constitutional concerns.

Respectfully submitted,

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